

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL ESPOSITO,)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-98-P-H
)	
CITY OF PORTLAND, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON DEFENDANTS'
MOTION TO DISMISS**

In this action arising from the alleged use of excessive force following an arrest, defendant police officers Michael Porter, Timothy Farris and Benjamin Moreland (collectively, "Officers") move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims against them for failure to state a claim upon which relief can be granted. *See* Motion To Dismiss the Complaint Against Police Officers Michael Porter, Timothy Farris and Benjamin Moreland Pursuant to Fed. R. Civ. P. 12(b)(6), etc. ("Motion") (Docket No. 14). Oral argument was held on September 10, 2003. I now recommend that the Motion be granted in part and denied in part.¹

¹ Subsequent to the filing of the instant motion (and in evident response to it) Esposito moved to amend his complaint. *See* Plaintiff's Motion To Amend Complaint, etc. (Docket No. 16). On August 1, 2003 that motion was granted without objection. *See* Endorsement to *id.*; *see also* Plaintiff's Amended Complaint and Jury Trial Request ("Amended Complaint") (Docket No. 20). Both Esposito in responding to the instant motion and the Officers in replying to that response geared their arguments to the Amended Complaint. *See generally* Plaintiff's Objection to Defendants Michael Porter, Timothy Farris, and Benjamin Moreland's Motion To Dismiss, etc. ("Objection") (Docket No. 17); Reply by Officers Porter, Farris & Moreland to Plaintiff's Objection to the Motion To Dismiss ("Reply") (Docket No. 19). Both parties then, "out of an abundance of procedural caution," clarified that the complaint in issue is the Amended Complaint. *(continued on next page)*

I. Applicable Legal Standard

“In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

II. Factual Context

For purposes of the Motion I accept the following as true.

Esposito is a resident of Portland, Maine. Amended Complaint ¶ 6. Defendants Brian Regan and Patrick DeCoursey were at all relevant times police officers employed by the police department of the City of Portland and assigned to the Maine Drug Enforcement Agency. *Id.* ¶¶ 7-10. The Officers, along with defendant Mark Teceno, were at all relevant times police officers employed by the police department of the City of Portland. *Id.* ¶¶ 11-18.

On September 26, 2002 DeCoursey and Regan were on duty patrolling the streets of Portland in an unmarked vehicle. *Id.* ¶ 35. They attempted to effect a stop of a motor vehicle Esposito was operating. *Id.* ¶ 36. A brief pursuit ensued. *Id.* ¶ 37. Ultimately, Esposito stopped his vehicle on Orchard Street and fled on foot. *Id.* ¶ 38. Porter located Esposito in the backyard of a home on the corner of Orchard and

See Reassertion of Motion To Dismiss the Amended Complaint by Officers Porter, Farris & Moreland Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 24); Plaintiff’s Renewal of Objection to Defendants Porter, Farris, and Moreland’s Reasserted Motion To Dismiss (Docket No. 27). I therefore construe the Motion, Objection and Reply to pertain to the Amended Complaint.

Fletcher streets in Portland. *Id.* ¶ 39. Porter, with gun drawn, ordered Esposito to the ground and radioed for assistance. *Id.* ¶ 40. Esposito complied with Porter's order. *Id.* ¶ 41. Teceno arrived on the scene and handcuffed Esposito. *Id.* ¶ 42. Porter moved toward the corner of the backyard while Teceno was handcuffing Esposito. *Id.* ¶ 43. Farris and Moreland entered the backyard after Esposito was handcuffed. *Id.* ¶ 44. In addition, after Esposito was handcuffed and obeying all orders, Regan entered the backyard. *Id.* ¶ 45.

Without provocation or justification, Regan jumped on Esposito's back and kicked and/or punched him in the head several times. *Id.* ¶ 46. Porter, while standing in the corner of the backyard, heard the struggle between Regan and Esposito. *Id.* ¶ 48. Moreland witnessed Regan strike Esposito. *Id.* ¶ 49. Moreland then left Esposito's immediate location and joined Porter in the corner of the backyard. *Id.* ¶ 50.

Moreland turned away from Esposito because he was sickened by what he saw. *Id.* ¶ 51. After Moreland turned his back on Esposito, he continued to hear Esposito crying out in pain and blows being landed on him. *Id.* ¶ 52. While in the corner of the backyard searching the area, with his back to Esposito, Porter told Esposito to stop resisting. *Id.* ¶ 53. Porter at one time told internal affairs that he did not hear anything that sounded like a struggle while he was searching the corner of the backyard. *Id.* ¶ 54.

Farris entered the backyard just behind Moreland. *Id.* ¶ 55. He saw Regan engage in a physical confrontation with Esposito. *Id.* ¶ 56. He then heard Porter say, "We're all set." *Id.* ¶ 57. Porter had his back to Regan and Esposito when he made this comment. *Id.* ¶ 58. Farris felt that something was not right because no one was rushing over to help Regan and Porter was making this comment with his back to Esposito. *Id.* ¶ 59. Farris decided to leave the scene because he did not want his partner, Moreland, to be involved in what was going on in the backyard and did not himself want to be involved. *Id.* ¶¶ 60-61.

While Farris was looking over the backyard for Moreland, he heard Esposito being struck three more times and screaming. *Id.* ¶ 62.

During the assault, Regan used derogatory language and profanity. *Id.* ¶ 63. After Regan finished assaulting Esposito, a shouting match between Esposito and Regan ensued. *Id.* ¶ 64. At that time, Teceno intentionally stepped on Esposito's genitals. *Id.* ¶ 65. The Officers witnessed Teceno's and Regan's assaults on Esposito and made no attempt to stop them. *Id.* ¶ 66. The Officers, by virtue of being Portland police officers present at the scene, had a duty to protect Esposito from DeCoursey, Regan and Teceno. *Id.* ¶ 67. The Officers did not report Regan's conduct to their superiors. *Id.* ¶ 68.

Teceno, Porter and Regan placed Esposito in the arrest van, driven by Portland police officer Robert Johnsey. *Id.* ¶ 69. Regan threatened and intimidated Esposito to prevent him from speaking with anyone about the assault. *Id.* ¶ 70. Teceno heard this threat and did not report it to his superiors. *Id.* ¶ 71. Regan instructed Johnsey to transport Esposito to DeCoursey so that he could speak with Esposito. *Id.* ¶ 72. Johnsey asked DeCoursey if he wanted the light in the back of the van on or off. *Id.* ¶ 73. DeCoursey requested that it be turned off. *Id.* ¶ 74. DeCoursey entered the arrest van and, without provocation or justification, punched Esposito several times in the face while Esposito was still in handcuffs. *Id.* ¶ 75.

Esposito was transported to the Cumberland County Jail ("Jail"). *Id.* ¶ 76. The Jail refused to accept him because of the severity of his injuries. *Id.* ¶ 77. He was then transported to Maine Medical Center. *Id.* ¶ 78. As a direct result of the defendants' actions, Esposito suffered a broken bone in his face, blurred vision, facial nerve damage and emotional distress. *Id.* ¶ 79. His injuries were complicated by the fact that he suffers from von Willebrand's hemophilia. *Id.*

Regan and DeCoursey conspired to cover up their illegal activities by falsifying official documents, including both incident reports and use-of-control reports. *Id.* ¶ 80. Teceno did not file a use-of-control report. *Id.* ¶ 85. Farris was not initially truthful with internal affairs investigators in this matter. *Id.* ¶ 86. At the time of the assaults, Teceno, Regan and DeCoursey had no reason to think Esposito presented any risk of harm to himself, the defendants or others. *Id.* ¶ 87.

Regan was charged by indictment with tampering with a witness, a Class B crime, and assault, a Class D crime, in the Maine Superior Court (Cumberland County) as a result of this incident. *Id.* ¶ 88. DeCoursey was charged by indictment with aggravated assault, a Class B crime, and assault, a Class D crime, in the Maine Superior Court (Cumberland County) as a result of this incident. *Id.* ¶ 89. At the time of these events, the Portland Police Department was under investigation by the Department of Justice. *Id.* ¶ 90. Investigators preliminarily have determined that there are serious problems regarding the manner in which the department polices itself. *Id.* ¶ 91.

III. Analysis

The Officers seek dismissal of all counts of Esposito's complaint that they construe as applicable to them, namely: Count I (a claim against all defendants for violation of 42 U.S.C. § 1985), Count IV (a claim against Porter for violation of 42 U.S.C. § 1983), Count VI (a claim against Farris for violation of 42 U.S.C. § 1983), Count VII (a claim against Moreland for violation of 42 U.S.C. § 1983), Count XIV (a claim against all defendants for violation of the Maine Civil Rights Act, 5 M.R.S.A. § 4682), Count XV (a claim against all defendants for civil conspiracy) and Count XIX (a claim against defendants Regan, DeCoursey, Porter, Teceno, Farris and Moreland for intentional infliction of emotional distress ("IIED")).

See Motion at 1-2; Amended Complaint ¶¶ 94-97, 110-15, 122-33, 170-76, 189-92. Since the filing of the Motion, Esposito has conceded:

1. In his opposition brief, that his Maine Civil Rights Act claim (Count XIV of the Amended Complaint) does not apply to the Officers, *see* Objection at 6; and

2. At oral argument, that (i) his section 1985 claim (Count I of the Amended Complaint) is predicated solely on section 1985(3), (ii) subsection 3 requires that a conspiracy be motivated by a racial or perhaps class-based discriminatory animus, (iii) he has as yet no evidence of the existence of such animus, and (iv) the Amended Complaint does not set forth facts establishing the existence of such animus on the part of the Officers.

These concessions entitle the Officers to dismissal of Counts I and XIV of the Amended Complaint as against them. I consider the remaining claims in turn.

A. Counts IV, VI & VII: 42 U.S.C. § 1983

The Officers next seek dismissal of Counts IV, VI and VII, alleging violation of 42 U.S.C. § 1983, on the basis that the Amended Complaint does not assert that they possessed a meaningful opportunity to intervene and stop the alleged assault on Esposito. *See* Motion at 6-9; Reply at 3-5. Despite the strenuous arguments of the Officers' counsel both in his papers and at oral argument that one can only reasonably infer, from the allegations of the Amended Complaint, that Esposito was subjected to unexpected, brief attacks that ended before any of the Officers could even appreciate what was happening (let alone intervene to assist Esposito), I am unpersuaded that dismissal on Rule 12(b)(6) grounds is warranted.

“An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance.”

Gaudreault v. Municipality of Salem, 923 F.2d 203, 207 n.3 (1st Cir. 1990). However, “[a] police officer cannot be held liable for failing to intercede if he has no realistic opportunity to prevent an attack.” *Id.* The Fourth Amendment requires that officers at the scene make a “reasonable attempt” to prevent the use of excessive force on the part of their fellow officers – not that they succeed in so doing. *See, e.g., O’Neill v. Krzeminski*, 839 F.2d 9, 12 (2d Cir.1988) (“Though not a guarantor of O’Neill’s safety in the face of brutality administered by other officers, Connors can be found liable for deliberately choosing not to make a reasonable attempt to stop Krzeminski.”).

The Officers argue that, even assuming *arguendo* the truth of the facts alleged, one cannot reasonably infer that they had the means or the opportunity to prevent Regan’s and Teceno’s sudden and unprovoked attacks. *See* Motion at 7-9; Reply at 3-5. They portray Esposito as “attempting to attribute liability to [them] merely because they were in the vicinity of where the constitutional violations allegedly occurred and may have witnessed some snippets of the activity under scrutiny.” Reply at 5.

This represents a crabbed construction of the Amended Complaint, which alleges that (i) all three Officers were physically present in the backyard during the Regan and Teceno attacks, (ii) Porter overheard the Regan attack but kept his back to Regan and Esposito, even while speaking to each of them, (iii) Farris and Moreland both witnessed the Regan attack, (iv) after Moreland turned away because he was sickened by the sight, he heard Esposito continue to cry out in pain as more blows were rained on him, (v) after Farris turned to search for Moreland in the hope that both he and Moreland could escape the scene, he too heard Esposito continue to cry out as more blows were struck, and (vi) after Regan had finished attacking Esposito, Teceno assaulted him. From all of this, one reasonably can infer that all three Officers grasped that Esposito was being subjected to a wrongful, vicious attack at Regan’s hands and, in the interval of time

during which all three sought to distance themselves, any or all reasonably could have attempted to intervene, possibly stopping the Regan attack and preventing the Teceno attack altogether.²

The Officers accordingly fall short of demonstrating entitlement to dismissal of Counts IV, VI or VII for failure to state a claim against them.

B. Count XV: Civil Conspiracy

The Officers next seek dismissal of Count XV of the Amended Complaint, alleging civil conspiracy, on the basis of failure to plead that they committed an underlying tort or arrived at any relevant “meeting of the minds.” *See* Motion at 10-11; Reply at 5-6.

At oral argument, counsel for Esposito clarified that (i) Count XV of the Amended Complaint presses solely a state-law claim of conspiracy and (ii) Esposito predicates that state-law claim on the underlying alleged tort of the Officers’ failure to intervene to assist Esposito, in violation of 42 U.S.C. § 1983, or, alternatively, the underlying alleged tort of the Officers’ commission of IIED.

Passing the question whether a tort grounded in federal law, such as an asserted violation of section 1983, can form the predicate for a claim of civil conspiracy pursuant to Maine law, I find that the Amended Complaint adequately states a claim for conspiracy predicated on the Officers’ alleged commission of IIED.³

² The Amended Complaint does not make clear whether the backyard was large or small or whether it was day or night; however, one reasonably could infer that the Officers, who could overhear Regan and Esposito, were in close enough proximity to have been heard by them.

³ At oral argument, counsel for Esposito cited two cases for the proposition that a state-law claim for civil conspiracy can be predicated on an asserted violation of 42 U.S.C. § 1983: *Francis-Sobel v. University of Me.*, 597 F.2d 15 (1st Cir. 1979), and *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977). However, both involve a section 1983 claim for civil conspiracy, rather than a state-law cause of action grounded on section 1983.

Pursuant to Maine law, “[t]o state a claim for civil conspiracy, the plaintiffs must allege that the defendants conspired to commit a tort and that acts were taken in furtherance of the conspiracy.” *Speedway Holdings Assocs., LP v. Bahre*, No. CIV.A.CV-00-501, 2001 WL 1710952, at *1 (Me. Super. June 13, 2001). “Civil conspiracy is not an independent tort.” *Id.* Accordingly, “absent the actual commission of some independently recognized tort, a claim for civil liability for conspiracy fails.” *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998).

In this case, Esposito adequately alleges the two key elements of civil conspiracy under Maine law: commission of an underlying tort by the Officers (IIED) and the existence of a meeting of the minds pertaining to it. *See Franklin v. Erickson*, 146 A. 437, 438 (Me. 1929) (“A conspiracy at common law may be defined, in short, as an agreement or combination formed by two or more persons to do an unlawful act, or to do a lawful act by unlawful means.”).

The first element – the stating of a claim for IIED – is discussed below. As regards the second element – the meeting of the minds – one reasonably can infer from the allegations of the Amended Complaint that upon seeing or hearing Regan’s assault on Esposito, the Officers tacitly agreed among themselves to distance themselves from the incident rather than attempt to intervene. When Moreland became sickened by what he was seeing, he joined Porter in a corner of the backyard. When Farris perceived what was happening, he went in search of Moreland in the hope that both he and Moreland could avoid becoming involved. None of the Officers reported the assaults to their superiors, and one initially falsely told investigators that he had not perceived the Regan assault. This is a sufficient factual underpinning to permit a reasonable inference that the Officers conspired to avoid assisting Esposito. For reasons

discussed below, one can, in turn, reasonably infer that the decision to refrain from assisting Esposito inflicted IIED on him.

The Officers therefore fall short of demonstrating entitlement to dismissal of Count XV for failure to state a claim against them.

C. Count XIX: IIED

The Officers finally seek dismissal of Count XIX of the Amended Complaint, which alleges the intentional infliction of emotional distress upon Esposito.

To state a claim for IIED, a plaintiff must allege that:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct;
- (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;
- (3) the actions of the defendant caused the plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Curtis v. Porter, 784 A.2d 18, 22-23 (Me. 2001) (citations and internal punctuation omitted). The Officers posit that one cannot draw a reasonable inference from the allegations of the Amended Complaint that they “intentionally” inflicted emotional distress on Esposito. *See* Motion at 11-13; Reply at 7. I am unpersuaded. The Amended Complaint depicts a scenario in which the Officers, although fully aware that Esposito was the helpless victim of a sickening and brutal beating at the hands of a fellow officer, chose to turn their backs on him. While the Officers may not subjectively have “intended” to inflict severe emotional

distress on Esposito, one could infer from the conduct alleged in the Amended Complaint that they either “recklessly” did so, or were substantially certain that such distress would result from their conduct.

The Officers hence fall short of establishing their entitlement to dismissal of Count XIX for failure to state a claim against them.

IV. Conclusion

For the foregoing reasons, I recommend that the Officers’ motion to dismiss be **GRANTED** as to Counts I and XIV and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 10th day of September, 2003.

David M. Cohen
United States Magistrate Judge

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